Office of Chief Counsel
Internal Revenue Service

memorandum

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date: APR 21 1999

to: Chief, Examination Division, Connecticut-Rhode Island District
Attn: Group Manager Ronald Hathway, Examination Group 1104

from: District Counsel, Connecticut-Rhode Island District, E. Hartford

subject: [redacted]

DISCLOSURE STATEMENT

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This is in response to your request for advice concerning the taxpayer's claims for refund relating to remittances made against deficiencies in income tax asserted for the taxable years [redacted], [redacted] and [redacted].

ISSUES

1. Whether the amounts remitted and applied against the taxpayer's tax liabilities for the taxable years [redacted], [redacted] and [redacted] constitute deposits in the nature of a cash bond or payments of tax?

2. If the amounts remitted are payments of tax, did the taxpayer file its claims for refund within the period set forth in I.R.C. § 6511?

CONCLUSIONS

1. The remittances in question were not, at the time the refund claims were filed, deposits in the nature of a cash bond, but rather constituted payments of tax subject to the period of limitations for refund claims set forth in § 6511.

2. The taxpayer did not file a timely claim for refund for the remittance made on [redacted] and applied against the deficiency in tax for the taxable year [redacted]. Conversely, it filed a timely claim for refund for the remittance made/credits applied on [redacted] and [redacted]. Similarly, the taxpayer filed a timely claim for refund for the remittances made on [redacted] and applied against the deficiencies in tax for [redacted] and [redacted]

FACTS

Our understanding of the facts is based on the documents you submitted and the information you supplied with your request for advice. If there are any errors in our statement of the facts, please contact this office for further advice.

During the audit of the taxpayer's [redacted] and [redacted] years, an issue arose concerning the use of a negative differential earnings rate. In [redacted] of [redacted], the taxpayer and the Service (New York City Appeals) reached a tentative settlement on this issue, and the taxpayer signed an Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment (Form 870-AD), dated [redacted], reflecting additional tax for [redacted] [1/] and [redacted] of $[redacted] and $[redacted], respectively, and no additional tax or overassessment for [redacted]. The Form 870-AD contains three qualifications: (1) acceptance does not occur until the date upon which the agreement is accepted by the Commissioner or the date upon which the Joint Committee on Taxation completes, without objection, its review of the settlement, whichever is later; (2) the taxpayer reserves the right to file a claim for refund on the negative earning differential issue; and (3) the waiver shall not be construed as a claim for refund. On [redacted], the taxpayer submitted two checks to the Service, fully paying the deficiencies shown on the Form 870-AD for [redacted] and [redacted]. Neither you nor the taxpayer have copies of the checks or any cover letter that may have been submitted with the checks, so we cannot determine whether the taxpayer included any instructions concerning the treatment of the remittance. However, the transcript of account indicates that the Service treated

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[1/] The deficiency for [redacted] is attributable to a NOL carryback from [redacted].

$[redacted] of the remittance made for [redacted] as a deposit in the nature of a cash bond (Transaction Code 640)[2] and the balance ($[redacted]) as a designated payment of interest (Transaction Code 680).

The Joint Committee on Taxation completed its review, without objection, on [redacted], and the deficiencies in tax set forth in the Form 870-AD and restricted interest of $[redacted] were assessed on [redacted].[3] The additional assessments of tax and interest were satisfied by applying the remittance made on [redacted], overpayments transferred from other tax modules ($[redacted] towards the tax and $[redacted] towards the interest), and a payment of $[redacted] received on [redacted].

Prior to reaching a tentative settlement, the taxpayer and the Service extended the statute of limitations on collection and assessment for the tax years [redacted] and [redacted] until [redacted] by signing a Consent to Extend the Time to Assess Tax (Form 872). Under the terms of the consent, the taxpayer had six months after the agreement ended to file a claim for refund for the years covered by the agreement. The Form 872 provides that the agreement ends on the date an assessment is made reflecting a final determination by the Service or [redacted], whichever is earlier. Consequently, since the additional tax liability determined under the Appeals settlement was assessed on [redacted], per the agreement the taxpayer had until [redacted] to file a claim for refund for the years involved. On [redacted], the taxpayer filed amended returns (Forms 1120X) for [redacted] and [redacted] claiming a refund in the amount of $[redacted] for [redacted] based on a carryback of a NOL from the taxable year [redacted].[4] On [redacted], the Service Center disallowed the claim on the ground that it was untimely.

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[2] As discussed later, we believe that this remittance should have been treated as an advance payment (Transaction Code 670).

[3] We do not know when the Form 870-AD was accepted by the Service since the copy provided to us is unsigned by the Commissioner. We assume, for purposes of this opinion, that the waiver was accepted after approval of the settlement by the Joint Committee on [redacted], and before the assessment was made on [redacted].

[4] On the same date, the taxpayer also filed a Form 1120X for the taxable year [redacted] increasing its net operating loss but claiming no overpayment.

The audit for [redacted], [redacted] and [redacted] was conducted in Connecticut. On [redacted], the taxpayer signed a Form 870 covering some of the items under examination.[5] (We assume that the taxpayer signed the Form 870 after receiving the agent's report.) The partial agreement reflected a deficiency in tax of $[redacted] for [redacted], an overassessment of $[redacted] for [redacted], and no deficiency or overassessment for [redacted]. At the same time, the taxpayer gave the revenue agent two checks, dated [redacted], together with a cover letter explaining that the first check ($[redacted]) should be applied against the tax ($[redacted]) and interest ($[redacted]) relating to the agreed audit adjustments for [redacted], and that the second check ($[redacted]) "represents a deposit towards the tax and interest on certain unagreed issues" for [redacted] ($[redacted] in tax and $[redacted] in interest) and [redacted] ($[redacted] in tax and $[redacted] in interest). The transcript shows that on [redacted], the first check was processed as a deposit in the nature of a cash bond (Transaction Code 640) while the second check was processed as a subsequent payment (Transaction Code 670).[6]

Subsequently, the Appeals Division reached a settlement with the taxpayer and, on [redacted], they executed a Form 870-AD reflecting deficiencies in tax of $[redacted] and $[redacted] for [redacted] and [redacted], respectively, and no deficiency or overassessment for [redacted].[7] The deficiencies in tax for [redacted] and [redacted] were assessed on [redacted]. On [redacted], the taxpayer filed amended returns (Forms 1120x) for [redacted] and [redacted] claiming refunds of $[redacted] and $[redacted], respectively.[8] The

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[5] It appears that the Form 870 was never executed by the Service as no assessment of the deficiency for [redacted] was made at that time.

[6] For the reasons discussed later, we believe that the first check relating to the agreed items should have been treated as an advance payment (Transaction Code 670) and the second check should have been treated as a deposit in the nature of a cash bond (Transaction Code 640).

[7] The taxpayer, on [redacted], and the Service, on [redacted], executed a Consent to Extend the Time to Assess Tax (Form 872)extending the period of limitations for filing a claim for refund until six months after the agreement ends.

[8] While the Forms 1120X and the cover letter are dated [redacted], it appears that the taxpayer has not submitted proof that they were mailed on that date. The Service's records reflect that the claims were received on [redacted]. Since that date was a Monday, we are assuming for purposes of this

claims for refund relate to the deficiencies attributable to the unagreed items. By letters dated [redacted], the Service Center notified the taxpayer that its claims for refund were disallowed because they were untimely.[2/]

DISCUSSION

As a general rule, I.R.C. § 6511 provides that a claim for refund must be filed within three years from the time the return is filed, or two years from the time the tax is paid. The filing of a timely claim for refund is a prerequisite to instituting a suit for refund. I.R.C. § 7422(a); Hazzard v. Weinberger, 382 F. Supp. 225, 228 (S.D.N.Y. 1974), aff'd, 519 F.2d 1397 (2d Cir. 1975). Although § 7422 does not specifically refer to jurisdiction, it has been held that in the absence of a duly filed claim for refund, neither the Court of Claims nor the federal district courts have jurisdiction to entertain a refund suit. Carson v. United States, 506 F.2d 745 (5th Cir. 1975); United States v. Freedman, 444 F.2d 1387 (9th Cir. 1971), cert. denied, 404 U.S. 992 (1971); Mondshein v. United States, 338 F. Supp. 786, 788 (E.D.N.Y. 1971), aff'd, 469 F.2d 1394 (2d Cir. 1973). An untimely claim for refund is not duly filed. Crimismon v. United States, 550 F.2d 1205, 1206 (9th Cir. 1977), cert. denied, 434 U.S. 807 (1977). The requirement that a claim for refund be filed prior to bringing a suit has withstood taxpayers' challenges based on a denial of due process argument. Dodge v. Unites States, 240 U.S. 118, 122 (1916).

The period of limitations set forth in § 6511(a) applies to overpayments of tax and the limitation of § 6511(b)(2)(B) applies to tax paid during the two-year period preceding the refund claim. However, § 6511 does not apply to deposits of tax, as distinguished from payments of tax. Rosenman v. United States, 323 U.S. 658 (1945). Consequently, if a remittance is a deposit, the taxpayer may obtain its return despite the running of the period of limitations on refunds for overpayments set forth in § 6511. It appears that the taxpayer claims that the remittances paid over to the Service in [redacted] and [redacted] are deposits and not advance payments subject to the § 6511 period of limitations.

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advisory that the claims were mailed on [redacted]. However, you should ask the taxpayer to substantiate that the claims were, in fact, mailed on that date.

[2/] The taxpayer has two years from the time its claim for refund is disallowed by the Service to commence suit in court. I.R.C. § 6532.

The Service's procedures for determining whether a remittance is a payment of tax or a deposit in the nature of a cash bond are set forth at Rev. Proc. 84-58, 1984-2 C.B. 501. It provides that a remittance made before the mailing of a notice of deficiency designated by the taxpayer in writing as a deposit in the nature of a cash bond will be treated as such by the Service. But if the taxpayer does not specifically designate the remittance as a deposit in the nature of a cash bond, the Service will treat the remittance as a payment of tax if it is made in response to a proposed liability (e.g., after the revenue agent's report is issued) and satisfies the proposed liability in full. Rev. Proc. 84-58 at §§ 4.02 and 4.03. Similarly, a partial remittance will be treated as a payment of tax if the taxpayer specifically designates what portion of the proposed liability he intends to satisfy; otherwise, partial remittances are treated as deposits in the nature of a cash bond. Rev. Proc. 84-58 at § 4.03. A remittance initially designated a deposit in the nature of a cash bond is applied as a payment of tax when the underlying tax liability is assessed. Rev Proc. 84-58 at § 4.02.

Applying the rules set forth in Rev. Proc. 84-58, we believe that the [redacted] remittance made for the taxable year [redacted] was not a deposit in the nature of a cash bond because it: (1) was not designated as a deposit, (2) was made in response to a proposed liability (i.e., the liability set forth in the Form 870-AD), and (3) satisfied the proposed liability in full. The fact that the settlement had not been approved by the Joint Committee nor accepted by the Service at that time does not change the classification of the remittance under the revenue procedure. Consequently, under § 4.03 of Rev. Proc. 84-58, this remittance should be considered a payment of tax as of the date submitted. Similarly, the credits applied on [redacted] and the remittance made on [redacted] were payments of tax as there is no evidence that the taxpayer intended the remittance to be a deposit, and they were applied against an assessed liability.

Looking at the claims for [redacted] and [redacted], we believe that the remittances made on [redacted] had become payments of tax by the time the claims for refund were filed. Although the remittance ($[redacted]) covering the liability for the unagreed items was initially designated as a deposit, under § 4.02 of the revenue procedure it became a payment of tax on [redacted] when the additional liability set forth in the Form 870-AD was assessed. Similarly, the remittance ($[redacted]) covering the liability for the agreed items constituted a payment of tax when made because, even though it appears that it only satisfied part of the asserted liability, the taxpayer specifically designated how it should be applied. Rev Proc. 84-58 at § 4.03

Since the remittances in question should be treated as payments of tax, the next question is whether the taxpayer filed its claims for refund within the period set forth in § 6511. Since the three-year period under § 6511(a) had expired when the claims were filed, the claims are timely only if they were filed within two years of payment (§ 6511(a)) or within the period specified in the Form 872 executed by the Service and the taxpayer (§ 6511(c)).

We believe that the claim relating to the taxable year [redacted], filed on [redacted], was not timely as far as the remittance made on [redacted] is concerned. Under the Form 872 executed by the taxpayer and the Service, the time for filing a refund claim expired six months after the agreement ended which, by its terms, occurred on [redacted], the date upon which the Service assessed the additional tax set forth in the Form 870-AD.[10/] Consequently, the period for filing a refund claim per the agreement expired on [redacted]. Moreover, we believe that the claim was not filed within two years of payment because, under Rev. Proc. 84-58, the tax was deemed paid on [redacted], the date upon which the remittance was made to the Service. As discussed above, that remittance should be treated as a payment of tax at that time because it was not designated as a deposit in the nature of a cash bond and it fully satisfied the additional liability set forth in the Form 870-AD. Consequently, the taxpayer had until [redacted] to file its claim for refund to recover that payment. However, the taxpayer's claim is timely for the credits applied on [redacted] ($[redacted]) and the remittance made on [redacted] ($[redacted]) as those payments were made within two years of the claim.[11/]

The taxpayer argues, relying on New York Life Ins. Co. v. United States, 118 F.3d 1553 (Fed. Cir. 1997), cert. denied, 66 U.S.L.W. 3704 (1998) that "a remittance of money to the I.R.S. to cover a payment expected to accrue in the future upon assessment, is a deposit until assessment date. As of assessment date, the remittance is a 'payment' under I.R.C. § 6511." Since the additional tax was assessed on [redacted], the taxpayer contends that the claim submitted for the taxable year [redacted] on [redacted]

[10/] Although the Form 872 related to the taxable years [redacted] and [redacted], the period of limitations set forth in that agreement applies to [redacted], the carryback year. I.R.C. § 6511(d)(2)(A).

[11/] The taxpayer states in a letter to the Service Center that it made additional tax payments totaling $[redacted] against the [redacted] tax liability on [redacted] and [redacted]. But the transcript reflects that the payments were made on the dates and in the amounts stated above.

[redacted] was timely.[12] While we agree that the New York Life case provides support for the taxpayer's position, we also believe that it can be distinguished on the facts and, in any event, establishes a standard that would not be applied by most circuit courts, including the Second Circuit.

In New York Life, the Service sent the taxpayer a 30-day letter in August 1992 proposing adjustments for 1984 through 1987.[13] The taxpayer protested the 30-day letter, and the Service agreed to consider the matter further. During this consideration period, the taxpayer and the Service extended the period for assessment of tax for the 1987 year and the related 1984 carryback year to September 30, 1994. In November 1993, the parties reached a tentative settlement under which the taxpayer agreed to pay the deficiency but reserved the right to prosecute a refund claim. On December 17, 1993, the taxpayer sent the Service three checks as payment of the additional tax and interest, stating in the cover letter that the portion of the payment representing the additional tax was based on the tentative settlement with the Service. In March and May 1994, the taxpayer submitted to the Service executed forms waiving the restrictions on assessment for the years covered by the proposed settlement. In its cover letter, as well as in the waivers on assessment, the taxpayer reserved the right to file claims for refund to raise specific substantive issues. The Service timely assessed the tax due for 1987, but no assessment was made for 1984 before the statute of limitations expired on September 30, 1994.

The taxpayer filed a suit in the Court of Federal Claims, seeking the return of the remittance made for the tax year 1984. The government argued that the case should be dismissed for lack of jurisdiction because the taxpayer had failed to file a claim for refund, as required by I.R.C. § 7422, before commencing the suit.[14] The taxpayer argued, and the court agreed, that there was no requirement to file a claim for refund because the remittance was a

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[12] It appears that the taxpayer is only making this argument to support its claim for the taxable year [redacted].

[13] Coincidently, the adjustments in New York Life, like the adjustment in this case, related to the negative differential earnings rate.

[14] We note that since the remittance for the taxable year 1984 was dated December 17, 1993, the taxpayer had until December 17, 1995, to file a claim for refund. Therefore, it could have filed a timely refund claim even after it commenced suit on October 31, 1994.

deposit in the nature of a cash bond and not a payment of tax. The court stated that it has been consistently recognized that a remittal of money against an assessed or likely tax liability may, depending on the facts and circumstances, be either a payment of tax or a deposit. The court, believing that it was following its previous decision in Cohen v. United States, 995 F.2d 205 (Fed. Cir. 1993),[15/] held the remittance to be a deposit based on four significant facts: (1) the taxpayer received a letter from the Service proposing to assess a deficiency; (2) the taxpayer remitted money which it described as payment of additional tax and which allocated the money between tax and interest; (3) the taxpayer protested the deficiency, and in making the remittance, reserved the right to seek recovery; and (4) the Service failed to timely assess the tax deficiency. Since the court considered the remittance in question a deposit, it held that the taxpayer was not required to file a claim for refund before bringing suit.

Even though the facts in New York Life are very similar to those here, we believe that it is distinguishable because of one significant factual difference. In New York Life, the court seems to place substantial weight on the Service's failure to assess the underlying tax deficiency within the period of limitations. While we believe that this fact should not affect whether a remittance is treated as a payment of tax or a deposit -- see Ewing v. United States, 914 F.2d 499 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991)(holding that the remittance was a payment of tax even though the tax was not timely assessed) -- it appears that the court was, for equitable reasons, reluctant to allow the Service to retain amounts paid when the underlying tax deficiency had not been timely assessed. Here, the tax deficiency was timely assessed.

[15/] We believe that the facts in Cohen provided stronger support for the taxpayers' position than the facts in New York Life. In Cohen, the taxpayers made the remittance for 1980 after a statutory notice had been issued for 1980 and 1981 and after they had filed a petition with the Tax Court contesting the Service's determination for 1981. In their petition, the taxpayers indicated that they intended to pay the tax for 1980, file a claim for refund, and, if denied, litigate the claim in the United States Claims Court. Moreover, the taxpayers did not sign a waiver agreeing to the assessment, but rather they simply allowed the time to petition the Tax Court to lapse. Thus, based on these facts, there is little doubt that the taxpayers were still contesting the Service's determination when they made the remittance for 1980. In contrast, the taxpayer in New York Life signed a waiver agreeing to the assessment while reserving its right to file a claim for refund. Unlike the taxpayer in Cohen, it did not state that it intended to file such a claim.

While a few courts have adopted a "per se rule" treating all remittances made before assessment as deposits if the taxpayer is disputing the underlying liability -- see Ford v. United States, 618 F.2d 357 (5th Cir. 1980)(holding that the remittance was a deposit under the law of the circuit but questioning the precedent in that circuit); United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956) -- most courts, including the Federal Circuit, have rejected this hard-and-fast rule. See Lewyt Corp. v. Commissioner, 215 F.2d 518 (2d Cir. 1954), aff'd in part and rev'd in part on other grounds, 349 U.S. 237 (1995). See also Moran v. United States, 63 F.3d 663 (7th Cir. 1995); Cohen v. United States, 995 F.2d 205 (Fed. Cir. 1993); Ewing v. United States, 914 F.2d 499 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991); Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970). Rather, these courts have concluded that the issue of whether a remittance is a payment of tax or a deposit is a question of fact to be determined by examining all the relevant facts and circumstances. Ewing, 914 F.2d at 503; Ameel, 426 F.2d at 1273. Relevant facts include: (1) when was the tax liability defined, (2) the taxpayer's intent in remitting the money, and (3) how the Service treated the remittance upon receipt. Blatt v. United States, 34 F.3d 252, 255 (4th Cir. 1994); Ewing, 914 F.2d at 503. A crucial factor is the intent of the taxpayer at the time the remittance was made. Blatt, 34 F.3d at 255. See also Ford, 618 F.2d at 360. Generally, a remittance is considered a payment of tax if the taxpayer intends that the remittance satisfy what the taxpayer regards as an existing tax liability. Rosenman, 323 U.S. at 661-662; Blatt, 34 F.3d at 255; Ameel, 426 F.2d at 1273; Hill v. United States, 263 F.2d 885, 886 (3d Cir. 1959); Lewyt Corp., 215 F.2d at 522-523.

Looking at the factors listed above, it is clear that the taxpayer made the [redacted] remittance in response to a defined tax liability (i.e., the [redacted] deficiency listed in the Form 870-AD). Moreover, there is no evidence, other than reservation of the right to file a claim for refund, that the taxpayer intended the [redacted] remittance to be a deposit. Unlike most cases where the courts have found that remittances were deposits, there is no evidence that the taxpayer made the remittance under protest or specifically expressed its intention to further contest the deficiency set forth in the Form 870-AD. See Rosenman (tax paid under protest); Cohen (taxpayers indicated that they intended to contest the liability in the Court of Claims); Lewyt Corp. (taxpayer contesting liability in Tax Court when the remittance was made). Cf. Moran, 63 F.3d at 669 (holding that the remittance made while the taxpayer was contesting the liability in the Tax Court was a payment of tax.) Contrary to the conclusion reached in New York Life, the reservation of the right to file a claim for refund does not necessarily mean that the taxpayer intended the remittance to be a deposit since it would have had to pay the tax before it

could bring an action to contest the deficiency forth in the Form 870-AD. Flora v. Unites States, 362 U.S. 145 (1960). And even without this reservation, the taxpayer might have still been able to commence a refund action to contest the deficiencies asserted in that agreement. See Lignos v. United States, 439 F.2d 1365 (2d Cir. 1971); Unita Livestock Corp. v. United States, 355 F.2d 761 (10th Cir. 1966). Does this mean that, absent specific instructions from the taxpayer, every remittance made to satisfy a deficiency set forth in Forms 870 should be treated as a deposit since the taxpayer could file a claim for refund contesting the Service's determination? We do not believe that such a result is consistent with the prevailing view that even before assessment, all the facts and circumstances must be examined to determine whether a remittance is a deposit or a payment of tax.

Finally, we believe that the Service's error in treating this remittance as a deposit rather than a payment of tax should not be controlling. While the Service's treatment of a remittance is one factor the courts consider -- see Rosenman, 323 U.S. at 662; Moran, 63 F.3d at 670; Blatt, 34 F.3d at 256; Lewyt Corp., 215 F.2d at 522 -- the Service's treatment of the remittance in question was contrary to its announced procedures in Rev. Proc. 84-58. Consequently, we believe that the Service's institutional position concerning the treatment of the remittance in question should be given more weight than a Service employee's decision concerning the transaction code to be used to process the payment. See Moran, 63 F.2d at 668 (considered Rev. Proc. 84-58 in determining that the remittance was a payment of tax); Ameel, 426 F.2d at 1273 (among other things, the court looked to Rev. Proc. 63-5, the predecessor to Rev. Proc. 84-58, to determine the nature of the remittance); Johnson v. Commissioner, T.C. Memo. 1993-562 (holding that the remittance was a deposit even though the Service treated it as a payment of tax but later argued that it was a deposit under Rev. Proc. 84-58).

Moving on to the claims for the taxable years [redacted] ($[redacted]) and [redacted] ($[redacted]), which were filed on [redacted],[16] we believe that they were timely filed even though the period for filing claims for those years under the Form 872 expired on [redacted]. The remittances made on [redacted] for [redacted] and [redacted] ($[redacted] and $[redacted], respectively) relating to the deficiencies for the unagreed items were specifically designated as deposits. Thus, under § 4.02 of Rev. Proc. 84-58, these remittances did not become payments of tax until the underlying deficiencies were assessed on [redacted].

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[16] As indicated previously, you should ask the taxpayer for proof that they were mailed on that date.

Consequently, the claims for refund for those years were filed within two years of payment. I.R.C. §§ 6511(a) and 6511(b)(2)(B).

If you have any questions, or need any further information, please contact the attorney assigned to this case, Joseph F. Long, at (860) 290-4090. This opinion is subject to post-review in the National Office, which might result in modifications to the conclusions stated herein. Consequently, you should not take a binding action based on this opinion until that review process is completed. Should the National Office suggest any material change in the advice, we will inform you as soon as we hear from that office.

GERALD A. THORPE
District Counsel

By: (Signed) Joseph F. Long
JOSEPH F. LONG
Attorney